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No. 83-1692

In the Supreme Court of the United States

OCTOBER TERM, 1983

TRANSPORT WORKERS UNION OF AMERICA, AFL-CIO, PETITIONER

v.

CIVIL AERONAUTICS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE CIVIL AERONAUTICS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether the Civil Aeronautics Board reasonably determined that a seniority dispute that developed after the merger of two airlines should be submitted to arbitration.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A11) is reported at 725 F.2d 775. Civil Aeronautics Board Order 82-8-63 (Pet. App. A13-A32) is reported at 97 C.A.B. 565. Board Order 82-12-62 (Pet. App. A33-A53) is not officially reported.

JURISDICTION

The judgment of the court of appeals was entered on January 20, 1984. The petition for a writ of certiorari was filed on April 16, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

Section 408(b)(1) of the Federal Aviation Act of 1958, 49 U.S.C. (Supp. V) 1378(b)(1), provides in part:

> In any case in which one or more of the parties to a consolidation, merger, purchase, lease, operating contract, or acquisition of control, specified in subsection (a) of this section is an air carrier holding a valid certificate issued by the [Civil Aeronautics] Board under section 1371(d) of this title to engage in interstate or overseas air transportation, a foreign air carrier, or a person controlling, controlled by, or under common control with, such an air carrier or a foreign air carrier, the person seeking approval of such transaction shall present an application to the Board, and, at the same time, a copy to the Attorney General and the Secretary of Transportation, and thereupon the Board shall notify the persons involved in the transaction and other persons known to have a substantial interest in the proceeding, of the manner in which the Board will proceed in disposing of such application. Unless, after a hearing, the Board finds that the transaction will not be consistent with the public interest or that the conditions of this section will not be fulfilled, it shall, by order, approve such transaction, upon such terms and conditions as it shall find to be just and reasonable and with such modifications as it may prescribe * * *.

Section 2, Ninth, of the Railway Labor Act, 45 U.S.C. 152, Ninth, is set forth at Pet. 3-5.

STATEMENT

Under Section 408(b)(1) of the Federal Aviation Act of 1958 (the Act), 49 U.S.C. (Supp. V) 1378(b)(1), air carrier mergers are subject to the approval of the Civil Aeronautics Board (CAB or Board) upon terms and conditions that are "just and reasonable." When the Board approved the

merger of National Airlines into Pan American World Airways (Pan Am), in 1979, it conditioned its approval on the carriers' acceptance of the Board's standard labor protective provisions (LPP).

LPP Section 3 mandates (Pet. App. A3 n.3) that "* * * [i]nsofar as the merger affects the seniority rights of the carriers' employees, provisions shall be made for the integration of seniority lists in a fair and equitable manner * * *." LPP Section 13(a) provides that disputes arising under the LPP shall be resolved by arbitration (*id.* at A3 n.4).

Prior to the merger, Pan Am and National had different bargaining unit structures.[1] Following the merger, the National Mediation Board (NMB) ruled that Pan Am's premerger bargaining structure should prevail. Thus, some groups of employees who had belonged to the same unit at National were now split between different units in the merged company.[2]

After mediation and arbitration proceedings, integrated seniority lists were developed for the employees within the post-merger bargaining units. Since each list covered only the seniority rights of employees within the unit, there

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[1]National's mechanics, cleaners and stock clerks were all in a single bargaining unit represented by the International Association of Machinists and Aerospace Workers (IAM). National's station agents and ramp agents formed another bargaining unit, represented by the Air Line Employees Association (ALEA). At Pan Am, however, the mechanics and cleaners are grouped with the ramp agents in a unit represented by the Transport Workers Union (TWU), and the stock clerks and station agents are in an International Brotherhood of Teamsters (IBT) bargaining unit (Pet. App. A3-A4).

[2]National's cleaners joined a bargaining unit represented by the TWU, while the stock clerks joined the IBT bargaining unit. Similarly, the National ramp agents were assigned to the TWU unit, while the station agents joined the IBT unit. Pet. App. A4.

remained the question whether former National employees would preserve seniority rights to jobs that had been within their bargaining unit at National but were not in their bargaining unit at Pan Am (*e.g.*, whether station agents with ramp agent experience at National who now held jobs falling within the International Brotherhood of Teamsters (IBT) unit would have any seniority rights over ramp agents with jobs falling within the Transport Workers Union (TWU) unit). The TWU disagreed with the contention made by other unions that former National employees should be given a one-time chance to use their former National seniority rights in their new job classifications. After the parties were unable to settle this dispute, the CAB was asked to order arbitration. Pan Am and TWU opposed the request and argued that the relief sought by the other unions would violate the bargaining unit structure approved by the NMB.[3]

The Board granted the petitions for arbitration (Pet. App. A30-A31). In so holding, the Board noted (*id.* at A24) that it was not "decid[ing] the merits of the claim." Rather, the Board decided only that the union claims involved a seniority dispute caused by the Pan Am-National merger and were therefore within the scope of the LPP (*id.* at A30-A31). While the Board recognized that the relief sought by the unions requesting arbitration "might mean that these employees, for a limited time, would move between bargaining units," that circumstance did not, in the Board's opinion, "so clearly violate the NMB's order as to require [the] dismissal of the petitions for arbitration" (*id.* at A26). Moreover, the Board stated that it preferred to have the arbitrator resolve the NMB jurisdiction question,

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[3]The NMB did not submit any views to the Board; nor did Pan Am and TWU claim to have made any effort to obtain the NMB's views (Pet. App. A42).

"particularly since the arbitrator will be more experienced in labor law matters than we are" (*id.* at A27). The Board subsequently denied Pan Am's petition for reconsideration (*id.* at A33-A53). It concluded again that Pan Am and TWU had not shown that the relief sought by the other unions would "inevitably violate the NMB's jurisdiction" (*id.* at A43). The Board additionally noted that Pan Am and the TWU had based their argument on an erroneous premise, that the other unions were trying "to change the boundaries of the bargaining units," when in fact no such relief was sought (*ibid.*).

The court of appeals affirmed (Pet. App. A1-A11). The court held that the Board may direct arbitration of disputes that are at least arguably covered by the LPP, that the dispute here involved seniority rights under the LPP, and that consequently the Board properly granted the petitions for arbitration. The court rejected the TWU's contentions that "the case really involves" representational rights (*id.* at A8), pointing out that the boundaries of the bargaining units would not be changed, so that "[n]othing the [other] unions seek would alter the class and craft system approved by the NMB" (*ibid.*).

ARGUMENT

The decision of the court of appeals upholding the Board's submission of this dispute to arbitration is correct and does not conflict with any decision of this Court or any court of appeals. Accordingly, further review by this Court is not warranted.

1. It is well established that the CAB has the authority to order arbitration of a dispute that is "* * * at least arguably covered by the LLP[] * * *." *Pan American World Airways, Inc.* v. *CAB*, 683 F.2d 554, 559 (D.C. Cir. 1982). This is in keeping with the general rule that "[a]n order to arbitrate the particular grievance should not be denied unless it

may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582-583 (1960).

In this case, it was appropriate for the Board to order arbitration because the crux of the dispute was whether Pan Am and the unions had adhered to the LPP requirement that seniority would be integrated "in a fair and equitable manner." The Board's authority, indeed its responsibility in airline mergers, to provide for a fair integration of seniority lists is clear. *Outland* v. *CAB*, 284 F.2d 224, 228 (D.C. Cir. 1960); *Kent* v. *CAB*, 204 F.2d 263 (2d Cir. 1953); *International Association of Machinists* v. *Northeast Airlines*, 536 F.2d 975, 977 (1st Cir.), cert. denied, 429 U.S. 961 (1976); *Northeast Master Executive Council* v. *CAB*, 506 F.2d 97, 101 (D.C. Cir. 1974), cert. denied, 419 U.S. 1110 (1975). It is similarly clear that the "dispute is thus at least facially a seniority dispute" (Pet. App. A8). As the court of appeals pointed out, "[a]ny relief granted by the arbitrator or the CAB must be couched in terms of seniority rights" (*ibid.*).

2. Petitioner, while conceding that the dispute is "couched" in terms of seniority, argues that in reality it involves a representational dispute that is within the exclusive jurisdiction of the NMB and therefore is not arbitrable (Pet. 22). The Board and the court of appeals, however, properly applied the settled rule that "doubts should be resolved in favor of [arbitration] coverage" (*United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 583 (1960)). As the Board noted, the other unions were not trying to change Pan Am's bargaining structure and did not seek to represent anyone in the TWU unit; they were requesting arbitration for a dispute of a type that had been held by the courts not to be within the NMB's exclusive jurisdiction. *United Transportation Union* v. *Burlington Northern, Inc.*, 332 F. Supp. 486 (D. Minn. 1971), aff'd,

470 F.2d 813 (8th Cir. 1972) (Pet. App. A26, A43-A46).[4] The court of appeals agreed that the seniority controversy here did not involve a representational dispute (Pet. A8); the court found that the other unions were not seeking to broaden their representational status or alter the class and craft system approved by the NMB.[5]

3. Petitioner is also incorrect in challenging the Board's decision to let the arbitrator consider the issue of NMB jurisdiction (Pet. 22). The Board, of course, was unpersuaded by petitioner's claim that this was not a seniority dispute; it found that seniority was at issue.[6] At the same time, however, it did not foreclose the possibility that as the facts were more fully developed in the arbitration, the characterization of the dispute might change. Accordingly, it permitted the parties to submit the issue of NMB jurisdiction to the arbitrator. Petitioner's contention that the Board somehow lacked authority to take this reasonable step is

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[4]Thus, petitioner is inaccurate in contending that a representational dispute subject to exclusive NMB jurisdiction is present whenever a matter "involves the movement of employees back and forth across different class and craft lines" (Pet. 24). See also *Brotherhood of Locomotive Firemen & Enginemen* v. *NMB*, 410 F.2d 1025 (D.C. Cir. 1969).

[5]Petitioner cites *Air Line Pilots Association International* v. *Texas International Airlines*, 656 F.2d 16, 23 (2d Cir. 1981) for the proposition that the Board must defer to the NMB when there is a "hint" of a representational dispute (Pet. 18). That case is inapposite. First, in that case the arbitrability of the dispute was not at issue; it involved only a choice of remedy between a lawsuit in the district court and proceedings before the NMB. Second, the Second Circuit held that before the district court action could be dismissed, the record must "reveal[ ] a representation dispute," rather than a mere "hint" of a dispute. *Id.* at 23.

[6]Since the Board found that this was a seniority dispute, it did decide the jurisdictional question of arbitrability. See Pet. 22; *John Wiley & Sons, Inc.* v. *Livingston*, 376 U.S. 543, 545-547 (1964). Such a decision is not inconsistent with affording to the arbitrator the latitude to revisit the question in light of the record developed in the arbitration.

groundless. The Board is under no obligation to decide every issue that might arguably turn out to prevent an arbitrator from granting relief. *Pan American World Airways, Inc.* v. *CAB*, 683 F.2d at 559; *Delta Air Lines, Inc.* v. *CAB*, 574 F.2d 546 (D.C. Cir.), cert. denied, 439 U.S. 819 (1978); *American Airlines, Inc.*, v. *CAB*, 445 F.2d 891, 896 (2d Cir.), cert. denied, 404 U.S. 1015 (1972). By allowing an expert arbitrator to reappraise the nature of the dispute as the record developed, the Board showed sound judgment rather than arbitrariness. *Outland* v. *CAB*, 284 F.2d at 228; *American Airlines, Inc.* v. *CAB*, 445 F.2d at 895.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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